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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. [redacted] 33

NORTHWEST AIRLINES, INC.,

vs. Petitioner,

STATE OF MINNESOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 882

In the Matter of the Proceedings to Enforce Payment of Delinquent Personal Property Taxes for the Year 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR THE STATE OF MINNESOTA IN OPPOSITION.

Opinion Below.

The findings of fact and conclusions of law of the District Court (R. 10-16) are not officially reported. The opinion of the Supreme Court of Minnesota (R. 17-39) is reported in 7 N. W. (2nd) 691 (Advance Sheets).

Jurisdiction.

Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court (R. 18-39) violates the 14th Amendment to the United States Constitution and that the decision is in conflict with the holdings of this court. While a Federal question is presented, it is not shown that the decision is in conflict with the holdings of this court.

Question Presented.

Whether a personal property tax laid by the State of Minnesota on the fleet of planes operated by the petitioner in interstate commerce to and from Minnesota violates Article 14, Section 1 of the Constitution of the United States.

Statute Involved.

The statute under which the tax in question was levied is Minnesota Statutes 1941, Section 272.01 (Mason's Minnesota Statutes 1927, Section 1974) and reads as follows:

> "All real and personal property in this State, and all personal property of persons residing therein, including the property of corporations * * *, is taxable, except such as is by law exempt from taxation."

Statement.

The State of Minnesota laid a personal property tax upon a given number of planes, according to the value of each plane, belonging to the petitioner for the year 1939 (R. 13-14, f. 26-27). The planes in question were flown in interstate commerce to and from Minnesota (R. 5-6, f. 10-11), and were continuously engaged in flying from state to state, except for brief stops at airports (R. 7, f. 14); and were in

Minnesota enroute, carrying passengers and the mails, or for major repairs or periodical overhauling, St. Paul, Minnesota, being the home port (R. 7-8, f. 14-15) and the base of major repairs and overhauling (R. 6, f. 11). And, for all that appears, all of said fleet was in Minnesota on May 1, 1939, the assessment date (R. 8, f. 15). The petitioner was domiciled in Minnesota and maintained its principal place of business and executive offices there (R. 5, f. 10), from which the system was directed and controlled.

The case was tried upon stipulated facts (R. 5-10). It was the position of the petitioner that only a portion of the full value of the fleet could be taxed by respondent, based upon the proportion of mileage in Minnesota (R. 9, f. 16). The trial court concluded that the petitioner's planes had a situs for taxation in Minnesota and not elsewhere (R. 15, f. 29) and that the tax was nondiscriminatory (R. 30, f. 48). The judgment of the trial court was affirmed by the state supreme court (R. 18-39).

ARGUMENT.

I.

The Decision Is in Accord with the Holdings of This Court.

The basis of the court's decision as expressed by it, is as follows: "The power of this court over defendant (petitioner) and the property taxed was present. Defendant was incorporated here. Its principal place of business is located in this state, and all the planes at some time or another come within its borders. The benefits conferred upon defendant (petitioner) by the government and laws of this state in relation to all defendant's (petitioner's) planes is equally clear. The policies and decisions made by defendant (petitioner) in connection with the operations of its planes were made here and under the protection and bene-

fits of the laws of this state. The manner and extent of their operation were determined and directed from this state. Particularly significant is the fact that when planes were in need of major repairs and overhauling the necessary repairing and overhauling were done here. These benefits did not cease the moment the planes crossed the border into another state. They continued and contributed to the successful operation of the planes throughout the course and scope of their operations.

There is, therefore, no violation of due process in the taxation by this state of all the planes. There was a fair basis in the power of this state over defendant (petitioner) and its planes and the benefits conferred with respect to this property upon which the tax may rest. We hold, therefore, that the tax here in question on all the planes was a valid one" (R. 28-29, f. 46-47).

The decision is consistent with *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 86 L. Ed. 1358; *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435, 85 L. Ed. 267; *Curry* v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339. It was on this basis that the court declared that the tax did not offend the 14th Amendment.

The petitioner seeks to distinguish the Aldrich case because involved therein was a tax upon intangibles. That case did not turn upon the nature of the property, whether tangible or intangible, but upon the relationship of the state to the person or property taxed; upon the benefits conferred and the protection afforded by the laws of Utah. So in the instant case, protection and benefits of inestimable value flow from the State of Minnesota and its laws to the petitioner and the property taxed.

The petitioner's views are based upon such cases as *Frick* v. *Pennsylvania*, 268 U. S. 473 and *Delaware L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, which were concerned

with tangible property (in the former it was an art collection) permanently located outside of the state of the owner's domicile. Such a tax was held to violate the 14th Amendment because the property was under the exclusive jurisdiction of another state and did not receive any protection or benefits from the laws of the domiciliary state.

II.

The Rolling Stock Cases Are Not Applicable.

The petitioner contends that the court should have held these planes were not taxable according to their full value under the doctrine of the rolling stock cases. It is the respondent's position that the doctrine of these cases is inapplicable here; that even if such doctrine were applicable, the petitioner failed to bring himself within it; and that as a result thereof under the decisions of this court the exclusive jurisdiction to tax is in the state of domicile.

The rule of the rolling stock cases is that when rolling stock is permanently employed within a foreign state or an average number of cars is so permanently employed therein, jurisdiction exists in that state to tax that number of cars. In all of the cases cited by the petitioner, except *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194, the tax was laid by a foreign state on the average number of cars found to be permanently employed therein. In the latter case, it appeared that though the corporation was domiciled in Kentucky, the headquarters for its cars was in Milwaukee, Wisconsin, at which place they were rented to shippers. As to these cars, the court denied the right of Kentucky to tax them because they were permanently located in another state.

In *Johnson Oil & Refining Co.* v. *Okla.*, 290 U. S. 158, strongly relied upon by the petitioner, a tax was levied by Oklahoma, a foreign state (Illinois being the domicile),

upon the company's entire fleet of 380 tank cars, when only an average of sixty-four were permanently located within the state. It was held Oklahoma had jurisdiction to tax only the 64 cars. But the court declared Illinois could tax the entire fleet if it had not acquired an actual situs elsewhere.

Application of this rule to aviation presents practical difficulties. The petitioner has through flights between Minneapolis, Minnesota and Chicago, Illinois passing over Wisconsin without stopping therein. Likewise on all flights to and from Oregon and Washington state, it passes over Idaho without stopping therein (R. 10-11, f. 20-20). Under the doctrine of the Rolling Stock cases, there is no basis for taxation in these states. How could the rule be applied? What protection or benefits flow from such states? The right to use the air is a federal right. Furthermore none of the cases support a claim for "proportional" taxation. The right to tax is limited to such items of property or an average number of such items as are permanently located within the state.

The tax in the instant case, is presumed to be valid until the contrary is shown. The burden rests upon the petitioner to establish that these planes come within the rule of the Rolling Stock cases. In this it has failed. There is no finding that any of these planes acquired a situs for taxation in any foreign state. The stipulation and findings of fact provide that these planes were constantly in flight from state to state (R. 7, f. 14; R. 12, f. 24), stopping only to discharge passengers; and were in Minnesota enroute (R. 12-13, f. 24-25), and for overhauling (R. 6, f. 11), or for major repairs, this being the home port (R. 13, f. 26). Thus they were probably in Minnesota more frequently and for a greater period of time than elsewhere. The majority opinion of the court states "Neither the stipulation nor the

findings of fact are as clear as one could wish on whether such an average number of planes was so constantly and permanently in any one state (other than state of domicile) as to acquire a situs there" (R. 23, f. 40). Having failed in its burden, it would appear that the domiciliary state may tax the entire fleet. *N. Y. C. & H. R. R. Co.* v. *Miller*, 202 U. S. 584; *Southern Pacific Company* v. *Kentucky*, 222 U. S. 63; *Johnson Oil Refining Company* v. *Oklahoma, Supra.*

III.

The Decision Is Sustained by the Steamship Cases.

The aviation systems of the nation which were national in character yesterday are international in character today. Aviation has revolutionized communications between the nations of the earth to an even greater extent than did the steamship. The court judicially knows of the established routes to Europe, South America, Africa, Asia and the South Pacific. Distances that required weeks of travel are now reached by air in a matter of hours or days. It has long been held to be the established rule by this court that ships whether engaged in commerce in the inland waters, the coastwise trade, or among the nations are taxable only at the domicile of the owner, because their stops, whether regular or casual, at various ports are but temporary and without any intention of permanently abiding at such places. The doctrine is as applicable to planes as to ships, and if so applied would avoid the necessity of having one rule for interstate aviation and another for international aviation. Applied to aviation, such a rule, tried and proven in water transportation, would solve this problem of taxation. *Hayes* v. *Pacific Mail S. S. Co.*, 58 U. S. (How.) 596; *Morgan* v. *Parham*, 83 U. S. (Wallace) 471; *Ayer Lord & Tie Company* v. *Ky.*, 202 U. S. 1082; *Southern Pacific Com-*

pany v. *Ky., Supra.* While this is not the ground upon which the court below based its decision, it could well have been founded upon these cases and is adequate grounds for affirmance.

Conclusion.

The decision of the Supreme Court of the State of Minnesota is in accord with the applicable decisions of this court. It is therefore respectfully submitted that the petition for a Writ of Certiorari be denied.

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